No. 10,078.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HELEN M. SUTHERLAND, CHARLES W. SUTHERLAND, M. I. HIGGENS, MAYBELLE HIGGENS and HELEN MAUDE LORENZ,

Appellants,

vs.

FRANK A. GARBUTT, CHANDIS SECURITIES COMPANY, a corporation; ALICE CLARK RYAN, LOG CABIN MINES COMPANY, a corporation, and MUTUAL GOLD CORPORATION, a corporation,

Appellees.

BRIEF OF APPELLEES FRANK A. GARBUTT, ALICE CLARK RYAN, LOG CABIN MINES COMPANY, AND MUTUAL GOLD CORPORATION.

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Jurisdiction.

It is conceded that the statement in appellants' opening brief disclosing jurisdiction of the District Court and of this Court is a correct statement.

Statement of the Case.

Mutual Gold Corporation, hereinafter called "Mutual Gold," was organized under the laws of the State of Washington on May 11, 1932, by Russell F. Collins, hereinafter called "Collins," and Ben L. Collins, brothers, and Harley Little.

On July 13, 1932, the Collins brothers entered into a contract [Tr. 23], hereinafter called the "1932 contract," with Alice Clark Ryan, her mother Mary N. Clark, and Chandis Securities Company, a California corporation, under which the Collins brothers were given the right to enter upon and develop some eighteen lode gold mining claims in Mono County, California, and to purchase the claims for $150,000.00 payable in installments. This contract was drafted by Frank A. Garbutt, appellee, hereinafter called "Garbutt," as agent for Mrs. Ryan, Mrs. Clark, and the corporation [Tr. 532]. Prior to 1932, considerable work in developing some of said claims had been done [Tr. 531, 543].

On July 18, 1932, the Collins brothers assigned the 1932 contract to Mutual Gold with the consent of Mrs. Ryan, Mrs. Clark, and Chandis Securities Company; and Mutual Gold assumed the obligations of the Collins brothers under that contract. Mutual Gold proceeded to spend a considerable sum of money in developing the property.

On April 28, 1934, Mrs. Ryan, Mrs. Clark, Chandis Securities Company, the Collins brothers, and Mutual Gold Corporation entered into a written agreement [Tr. 38] supplementing the 1932 contract in some particulars not material to this case. This was prepared by Garbutt [Tr. 748].

In 1935, Mrs. Clark conveyed her interest in the claims to Mrs. Ryan. Mrs. Ryan and Chandis Securities Company have ever since each owned an undivided one-half interest in said claims, and they are hereinafter called the "owners."

About that time Mutual Gold purchased and installed a second-hand stamp mill [Tr. 515].

On August 29, 1936, needing additional money, it entered into an agreement [Tr. 42] with one of its directors, J. A. Vance of Seattle, under which Vance, who had agreed to assist in raising the sum of $30,000.00, was made general manager with authority to expend said sum and with the right to remain general manager until it had been repaid to those who furnished it.

He went to the property October 3, 1936, and then went on to Los Angeles, where on October 10, 1936, he entered into an agreement on behalf of Mutual Gold [Tr. 45] with the owners represented by Garbutt [Tr. 748]. This agreement modified and amended the 1932 contract so as to permit milling of ore not theretofore allowed, so as to allow Mutual Gold a milling cost of $8.00 instead of $5.00 a ton as to certain ore, and so as to change Mutual Gold's option to buy into a firm obligation to pay the purchase price in installments.

He continued to act as manager in charge of the property until he closed down the mine on April 22, 1938 [Tr. 405, 780], by which time the $30,000.00 had been expended and Mutual Gold was practically without funds to continue operations, to pay its obligations, or to make further payments on the 1932 contract [Tr. 406, 605, 709, 785]. The mill had proved to be inefficient [Tr. 357, 406], and approximately $100,000.00 was needed to buy

a new mill and equipment. An unsuccessful attempt was made to interest one or two big mining companies in the property [Tr. 231, 460]. The whole enterprise appeared to have bogged down [Tr. 406].

In June, 1938, Vance had Robert J. Cole, a mining engineer, make a survey of the properties for Mutual Gold. Cole's report, dated June 14, 1938 [Tr. 242], was made available to the corporation at a meeting of the directors on June 25, 1938 [Tr. 459]. It indicated that the property had considerable value. Garbutt saw the report some time later, but did not believe it to be reliable [Tr. 310, 767, 768]. However, Vance evidently did rely upon it, for at said meeting of June 25, 1938, he proposed that he would form a new corporation to operate the property and put it into production if Mutual Gold would turn over to the new corporation a 60% interest in the property and give it 60% of the profits. This proposal was declined [Tr. 459, 713].

As a matter of fact, five of the seven directors preferred not to deal with Vance if they could obtain satisfactory financing elsewhere, as his operation of the property had not been very succesful, and as he was a lumber man rather than a mining man [Tr. 409, 410, 461, 771]. Some of the directors doubted Vance's interest in stockholders other than himself [Tr. 413, 414, 415, 417], and there was some fear that he would sue on some claims he had against the corporation [Tr. 466, 467]. He was at that time a large stockholder, the largest creditor, a director, and a vice-president of Mutual Gold [Tr. 185], and he still claimed to be its general manager.

Thereafter, on July 18, 1938, Lloyd Vance, son of J. A. Vance, for himself and his father, submitted a written

proposal [Tr. 232, 784] to the board of directors under which Mutual Gold was to retain a 40% interest in the assets and receive 40% of the profits if the new operating corporation to be formed paid Mutual Gold's indebtedness, or a 50% interest in the assets and 50% of the profits if Mutual Gold arranged to pay its own indebtedness. As there was then no other known source of financing for the enterprise [Tr. 460], a resolution was adopted by the directors [Tr. 236] that the offer be approved and recommended to the stockholders for acceptance after certain changes therein, agreed to by Vance, had been made, including a guaranty by Vance that $70,000.00 of the new corporation's stock would be subscribed for. The resolution also required that the annual meeting of the stockholders be called and held as soon as possible, and not later than August 6, 1938, for the purpose of electing a board of directors and for the purpose of approving and acting upon the Vance offer.

However, Collins told Director William L. Grill and probably the other directors at this meeting of July 18 that he was going to California to see if he could arrange for financing [Tr. 460]. Therefore, the resolution was made broad enough to include any other proposition that might be obtained in that the purpose of the stockholders' meeting was set out in said resolution to be the authorizing and empowering of the directors [Tr. 237] "to sell or otherwise dispose of the whole or any part of the assets of the corporation at such time or times and on such terms and conditions as they may deem adequate, and to form and enter into any working agreement along the lines as contemplated by the offer of said Lloyd Vance, or such other or different agreement as they may, in their absolute discretion, deem advisable * * *."

Pursuant to this resolution, a meeting of the stockholders was called for August 6, 1938, by notice [Tr. 239] sent to the stockholders. With each notice went a form of proxy [Tr. 188] and a letter written by J. E. Stiegler, president of Mutual Gold [Tr. 241].

Between the directors' meeting on July 18, 1938, and the stockholders' meeting on August 6, 1938, Collins, with M. J. Keily, went to Los Angeles [Tr. 407, 411, 528] to find out whether Garbutt, a competent mining man of means and much experience [Tr. 343, 563, 709, 745], would finance and operate the enterprise. Keily had been employed by Vance to act, and had acted, as mining engineer in charge of the property [Tr. 489] until it was closed down; and prior to that [Tr. 753] he had been employed by Garbutt for quite a long time [Tr. 340, 529]. However, Garbutt declined to enter a mining venture at his age, although he did enable them to contact two of his friends, namely, Hal Roach and Cecil De Mille, who he thought might be interested [Tr. 408, 529, 751].

At the meeting of August 6, 1938, Vance withdrew his offer [Tr. 250, 255] and submitted another, in which he proposed that a new corporation to be formed by him would take over the ownership of half of Mutual Gold's assets and take possession of all of them, and in which he expressly provided that his only obligation was to organize the new corporation [Tr. 256]. In fact, Vance was expecting Stiegler, president of the company, to provide part of the money [Tr. 417] to finance the new company. Under this offer, there was no assurance that a single share of the new corporation's stock would ever be subscribed for or paid for, or that the new corporation would ever have a dollar of working capital through sale of stock, loans, or otherwise. The new corpora-

tion was to agree to do certain things, but there was no assurance by Vance or anyone else that it could or would perform. This naturally did not increase the desire of the board to deal with Vance.

At this meeting, Collins said he thought there was a possibility of dealing with Garbutt [Tr. 251, 460]. With that in mind, the stockholders, including J. A. Vance [Tr. 501, 502], by more than a two-thirds majority [Tr. 247, 254], adopted a resolution authorizing the directors to do with the corporation's property as they saw fit, in order that the corporation might be able to accept any offer, whether from Vance or not [Tr. 461].

Later on the same day, the board of directors met and adopted a resolution authorizing Collins and Director G. H. Ferbert to go to Los Angeles at their own expense for the purpose of securing a contract with Garbutt if possible [Tr. 275]. Vance opposed the resolution, and when it was adopted, he withdrew his latest offer [Tr. 277]. The meeting was adjourned to August 13, 1938.

Collins and Ferbert made the trip [Tr. 385, 408, 710], but Garbutt still did not want to make a contract. A tentative draft of an agreement with De Mille was prepared, however, which was presented to the directors and discussed at the meeting on the adjourned date of August 13, 1938 [Tr. 381, 382]; and at that time Vance made another offer [Tr. 382, 667], which also contained the provision that his liability extended only to forming a new corporation. However, it appeared that a majority of the board did not want to enter into a contract of any kind with Vance [Tr. 382, 383]. De Mille soon learned of the possibility of trouble [Tr. 530] with Vance and declined to proceed further.

Directors Collins, Ferbert, Stiegler and Grill went to Los Angeles the week following [Tr. 418, 530, 714] and jointly importuned Garbutt to operate the property [Tr. 536]. They believed him to be the best man for the job [Tr. 408, 409, 414, 417, 418 to 422, 453, 454, 458, 461, 709 and 755]. At first he said he would not, but he promised to make arrangements to pay the $10,000.00 due the owners on November 1, 1938 [Tr. 419, 750]. Finally he reluctantly agreed to operate the property and to advance the necessary money on certain conditions. While the negotiations were in progress, he offered and arranged to get $25,000.00 to pay Vance and others what Mutual Gold owed them on open account, but as Vance refused to accept the money, the loan was not obtained [Tr. 466, 469, 715].

In the discussions, Garbutt learned of some particulars in which the Mutual Gold was in default under the 1932 contract; and on August 25, 1938, as agent of the owners, he directed to Mutual Gold a letter [Tr. 278] declaring a forfeiture of the 1932 contract, but leaving the way open to a revival thereof [Tr. 533]. On August 29, 1938, Vance wrote, as manager of Mutual Gold [Tr. 315], declining to accept cancellation of the contract, asserting that there was no default, and asking particulars as to the default. Garbutt answered, giving certain particulars, on September 2, 1938 [Tr. 279].

On September 2, 1938, the final draft of the agreement with Garbutt was executed [Tr. 51] by him and Mutual Gold.

At a meeting of the directors on September 7, 1938, which had been adjourned from time to time from August 6, 1938, six of the seven directors being present, all the

directors present except Vance and R. P. Woodworth voted for and passed a resolution ratifying the action of the officers in executing the contract of September 2, 1938, subject to ratification of the board's action by the stockholders at a special meeting to be called for that purpose. The absent director was Collins, who was in favor of the contract and approved it [Tr. 294]. Vance and Woodworth again attempted to have the Vance proposal accepted [Tr. 284 to 288]. They voted against a resolution authorizing the president to borrow $25,000.00 to pay open account creditors, of which Vance was the largest. Also, at this meeting, the directors instructed the secretary to call a meeting of the stockholders at the earliest possible time for the purpose of ratifying or refusing to ratify the execution of the contract of September 2, 1938, and for the purpose of considering and acting upon the Vance offer or any other offer.

On September 9, 1938, Garbutt wrote Mutual Gold, attention of Vance and Stiegler, a further answer to the Vance letter of August 29, 1938, in which he stated that negotiations for reinstatement of the 1932 contract would not be commenced until a satisfactory written reason had been given for Mutual Gold's failure to perform under that contract in a number of particulars [Tr. 289].

On September 12, 1938, the secretary sent out a notice of a stockholders' meeting to be held September 24, 1938, for the purpose of ratifying or refusing to ratify the action of the board of directors in accepting the contract of September 2, 1938, with Garbutt [Tr. 295], and for the purpose of considering the Vance or any other offer. With it went a form of proxy [Tr. 296] and a letter from President Stiegler [Tr. 292]. At the same time, Vance

sent to the stockholders letters advising against the Garbutt contract and enclosing a proxy for his use [Tr. 486, 488, 508].

On September 16, 1938, the president called a special meeting of the directors for September 19, 1938, to reconsider their action in accepting the Garbutt contract, and to consider any other proposal that might be presented [Tr. 297]. All the directors were present at the meeting, and all of them except Vance and Woodworth voted again to accept the contract and to ratify the action of the officers in executing it [Tr. 300]. The directors were advised that there was no point to going to the expense of holding another stockholders' meeting, as the stockholders had already given them full authority to act [Tr. 452, 709]. Therefore, by motion carried, they directed the secretary to call off the stockholders' meeting [Tr. 305]. At this meeting Vance and Woodworth again voted against a resolution authorizing the borrowing of $25,000.00 to pay the open account creditors [Tr. 304]. They also resigned as officers and directors.

Following this meeting, the contract of September 2, 1938, was re-executed on September 21, 1938, to satisfy the point made by some persons that the contract should not have been executed until after authorization by the board. This contract is hereinafter called "the September contract."

Pursuant to the provisions of the September contract, and at the time it was re-executed, Mutual Gold transferred its assets to Garbutt to be in turn transferred by him to a corporation which said contract required him to organize [Tr. 58, 60, 62, 760]. Some of the directors of Mutual Gold insisted that it should have at least full

minority representation on the board of whatever corporation was organized by Garbutt to operate the properties [Tr. 463], in order that Mutual Gold's interest might be protected. Garbutt, who had already by that time advanced some money to build a power line which was essential to efficient operation and which had to be built quickly to get ahead of the early snows that fall in that region [Tr. 243], proceeded to advance money as needed and to move as rapidly as he could toward putting the mine into operation [Tr. 194, 309].

On September 27, 1938, J. A. Vance, his attorney Mr. Abel, and Grill met in Garbutt's office in Los Angeles [Tr. 370, 671], but the conference did not reconcile the viewpoints of Vance and those who favored dealing with Garbutt. It ended with threats of litigation by the Vance interests [Tr. 462, 537].

On October 3, 1938, Garbutt's right to represent the owners was revoked [Tr. 317, 604].

On October 15, 1938, the owners, being assured that the defaults under the 1932 contract were in process of being cured, withdrew the notice of forfeiture [Tr. 537].

Garbutt caused the organization of Log Cabin Mines Company, hereinafter called "Log Cabin," to be started, and it was completed on October 18, 1938.

On or about that date he withdrew from the September contract for various reasons [Tr. 454, 533], including advice from his tax attorney that the contract might cause him some income tax difficulty. On October 21, 1938, the directors of Mutual Gold authorized Directors Grill and Ferbert [Tr. 320, 321] to enter into negotiations with Garbutt for a new contract. They went to Los Angeles for that purpose and conferred with him on October 31

and November 1 and 2, 1938 [Tr. 322]. At that time he handed them his formal withdrawal from said contract, and they, on behalf of Mutual Gold, entered into a temporary agreement dated November 1, 1938 [Tr. 66], to run pending the execution of another contract either with him or with someone else.

On November 2, 1938, two of the five organizing directors of Log Cabin resigned, and three of Mutual Gold's directors replaced them, thus giving Mutual Gold control of Log Cabin [Tr. 350]. Since then, Mutual Gold has at all times been represented by either two or three directors on Log Cabin's board, except for a while when Mutual Gold's representation resigned because of a fear that service on them in Washington might be deemed service on Log Cabin in a Washington suit which Vance had caused to be brought against it and others [Tr. 482, 483]. Also, Collins was employed at the mine where he could see what was going on and inform Mutual Gold [Tr. 309, 368, 535].

On November 7, 1938, Mutual Gold's directors approved and ratified the act of Grill and Ferbert in executing the temporary contract of November 1, 1938 [Tr. 322].

On November 28, 1938, Mutual Gold's directors considered some drafts of a new contract presented by Garbutt, but authorized Grill to prepare a contract for the corporation as nearly along the lines of the September contract as possible [Tr. 325].

As of December 17, 1938, another contract, hereinafter called the "December contract," was entered into [Tr. 69, 367] by Garbutt, Mutual Gold and Log Cabin, the execution thereof having been authorized by the Mu-

tual Gold's directors on that date [Tr. 327]. It was drafted by Grill [Tr. 326, 537 *et seq.*]. In the meantime, Garbutt had advanced to Log Cabin about $17,000.00 [Tr. 73] for the improvement of the property and $10,000.00 to pay the owners; and at the special request of Mutual Gold [Tr. 326, 568] had advanced other sums for taxes, repairs, etc.

On January 2, 1938, Garbutt began milling ore [Tr. 557].

Shortly after the Garbutt December contract was chosen in preference to the Vance contract and prior to January 14, 1938, Vance demanded immediate payment of all production notes and open accounts owing to him by Mutual Gold [Tr. 344], although he had previously declined payment and although they were not due.

At the next annual meeting of Mutual Gold's stockholders held on February 1, 1939, pursuant to notice [Tr. 606], the December contract was ratified by resolution. Out of 2,313,456 shares present or represented by proxy [Tr. 607], 1,458,969⅓ votes were cast for, and 841,153⅔ were cast against ratification [Tr. 433 to 435], notwithstanding the earnest efforts of Vance and his associates to prevent ratification [Tr. 485 to 518].

On or about February 28, 1939, in the Superior Court of Spokane County, Washington, Vance brought one suit on the open accounts and another on the production notes that Mutual Gold owed him [Tr. 610].

On April 13, 1939, A. P. Bateham and E. T. Richter, in co-operation with Vance, filed a suit in said Washington court to quiet the title of Mutual Gold to the 1932 contract [Tr. 603]. This suit did not go to trial.

About April 17, 1939, all of Log Cabin's 10,000 shares of capital stock were subscribed for by and issued to Mutual Gold, pursuant to resolution of Mutual Gold's directors [Tr. 320]. As Mutual Gold had no money to pay the $10,000.00 par value of the stock, it borrowed the money from Garbutt, pursuant to a resolution of its directors [Tr. 197, 321, 569]. Mutual Gold caused 5,001 shares to be transferred to Garbutt shortly thereafter. All the stock was placed in escrow by order of the California Commissioner of Corporations. It is still in escrow and none of Mutual Gold's 4,999 shares has ever been transferred, pledged or encumbered [Tr. 198, 547].

At and about the same time, Garbutt transferred to Log Cabin the assets which he had received from Mutual Gold. and Mutual Gold also executed and delivered conveyances and transfers of said assets directly to Log Cabin as contemplated from the beginning of negotiations with both Garbutt and Vance, and as authorized by resolution of Mutual Gold's board [Tr. 198, 199, 320]. Certain of Mutual Gold's assets that had not been transferred to Garbutt were also transferred to Log Cabin with the exception of some tailings and the surface of the ground on which they lay [Tr. 199].

On May 5, 1939, Log Cabin filed its suit against Mutual Gold in the Superior Court of Los Angeles County, California, to quiet its title to the 1932 contract. The directors of Mutual Gold resolved not to contest it, as they had no defense [Tr. 464, 476, 477, 480, 481]. Lloyd Vance, who had been elected a director of Mutual Gold, was present and heard the resolution read [Tr. 658].

On June 6, 1939, Mutual Gold's directors approved the December contract by resolution [Tr. 197].

On June 13, 1939, Log Cabin obtained judgment in its quiet title suit [Tr. 571].

On December 20, 1939, Vance caused the instant suit to be brought [Tr. 177, 178, 701, 705, 728, 736, 786 *et seq.*].

On February 14, 1940, the Spokane County Superior Court made its findings and conclusions and rendered its judgment against Vance in his suit for money owing him, holding that the money was not due and holding on other points much as the trial court did in the instant case [Tr. 641 to 657]. This judgment was sustained by the Supreme Court of Washington (*Vance v. Mutual Gold Corporation,* 6 Wash. (2d) 466, 108 Pac. (2d) 799).

Garbutt has carried out his agreement to the letter [Tr. 455]. He has advanced more money than he agreed to advance [Tr. 527]. He has given much of his time without compensation [Tr. 199, 528, 549]. He has not received any return on his advances, either on principal or interest. [Tr. 525, 528]. He has installed valuable and up-to-date equipment [Tr. 200, 541, 684]. He has not taken any notes from Mutual Gold for his advances or any liens on the property or on Mutual Gold's stock in Log Cabin [Tr. 547, 554]. He has taken out and milled a large amount of ore, reducing the cost of operation greatly; but because of the low grade of ore mined, there has been little profit [Tr. 201, 544, 552, 688, 695, 698].

ARGUMENT.

In appellants' argument they advance five theories under which they contend that the judgment should be reversed. Appellees will consider them in order.

First Theory—That the Acts Complained of Were Void Because Beyond the Powers of Mutual Gold to Perform (p. 19 of Appellants' Brief).

In seeking to establish this theory, appellants argue under eight subheadings designated (a) to (h), inclusive. These will be considered in that order.

Subheading (a), page 19 of appellants' brief. It is conceded that the law of the State of Washington governs.

Subheading (b), page 19 of appellants' brief. It is also conceded that at the time Mutual Gold was organized in 1932 there was no statutory law in Washington governing the sale of all the assets of a corporation. But the law of Washington on that subject, as established by the Supreme Court of that state, has never prohibited transactions of the kind involved here

There was no sale of assets by Mutual Gold. There was an exchange, and the trial court so held [Tr. 203, Conclusion I]. That exchange was made by a corporation which was at the time, and for several months before had been, unable to meet its matured obligations. The court so found [Tr. 190, Finding XV, and Tr. 199, Finding XXXV], and the findings had ample support in the evidence [Tr. 605, 709, 785]. Mutual Gold could not carry on without outside aid. In the exchange made to obtain that aid, it received not only half the stock of Log Cabin less one share, but also the benefit of the use of $10,000.00

loaned it to buy that stock, of $23,500.00 paid to the owners, and of $100,456.20 expended in equipping and developing the mining property, not to mention Garbutt's services without charge [Tr. 199, 200, 527, 528, 541, 549, 684].

In *Logie v. Mother Lode Copper Mine Company of Alaska,* 105 Wash. 208, 179 Pac. 833 (1919), the Supreme Court of Washington approved a transaction substantially like the one here involved.

Subheading (c), page 24 of appellants' brief. Appellants assert that Mutual Gold, which was organized in 1932, is not controlled by the Washington Uniform Business Corporation Act of 1933; and in support of that assertion, they argue three points, as follows:

Their first point (p. 24 of appellants' brief) is that to hold the act controlling would be to change or burden unconstitutionally the minority stockholders' rights relating to sales of assets. This point is based on the proposition that every stockholder had the right to require a cash consideration. As we have already shown, that proposition has no foundation, and, therefore, the point itself has no support.

Their second point (p. 31 of appellants' brief) is that the act cannot control because Mutual Gold did not amend its articles to include the provisions of the act. This point is raised for the first time on appeal. Assuming it to be true that Mutual Gold's articles were not amended, the conclusion does not follow, and appellants cite no decision to support it. Section 3803-61, Rem. Rev. Stat., reads:

> "Except where otherwise expressly stated herein, this act shall be applicable to any existing corporation

formed under general incorporation laws of this state for a purpose or purposes for which a corporation might be formed under this act."

Section 3803-37, relied upon by appellants, does not expressly state that the act shall not apply to existing corporations unless they amend their articles to make it apply. It is obviously intended to provide a simple method by which an existing corporation may eliminate a permissible difference between a provision in its articles and a provision in the act. For example, suppose the articles of an existing corporation provided that the presence in person or by proxy of the holders of two-thirds of the voting power of all shareholders should constitute a quorum. Section 3803-30 provides that a majority shall constitute a quorum unless otherwise provided in the articles. Therefore, the mere enactment of the act would not change the provision from two-thirds to a majority, but under section 3803-37, a simple method of making the change is provided if the change is desired.

If appellants' point were well taken, a corporation could, by declining to amend its articles, prevent its shareholders from having liability under section 3803-20-2, could prevent its directors and shareholders from having liability under section 3803-25, could prevent trustees from having any laibility under section 3823, and could prevent liability of its officers under sections 2639, 2641, 2642, 3828 and 3829.

Their third point (p. 34 of appellants' brief) is that the act cannot be made to control by including therein the remedy to minority stockholders given in section 3803-41. No decisions are cited in support of this point. It, like the first point, is based on the proposition that every stock-

holder had the right to require a cash consideration, and, therefore, it is without support for the same reason the first point is.

Under subheading (c) the appellants also contend (p. 35 of their brief) that the consideration was wholly inadequate, contrary to the trial court's conclusion VI [Tr. 204]. As already stated, Mutual Gold made an exchange in which it received not only half the stock of Log Cabin less one share, but also Garbutt's services and the benefit of the use of $133,956.20 advanced by him. Whereas before the exchange Mutual Gold had no money to carry on or to pay the owners, and had no adequate milling machinery, now it has a half interest less one share in a corporation that has a new and efficient mill and other equipment, and that has kept the 1932 contract in good standing [Finding XXXVIII, Tr. 200, and XLII, Tr. 202].

Appellants present the argument that because Garbutt might have quit after advancing $10,000.00 only, and because if he had done that Mutual Gold might have suffered some damage, the benefits actually received by Mutual Gold out of the transaction should not be considered. The argument is novel and no citations are given to support it. Appellees don't think it necessary to cite any against it.

Subheading (d), page 42 of appellants' brief. The act did not work any fundamental change in Mutual Gold's charter, or divert it from its original purpose. The articles themselves provide [Tr. 209, 210] that some of the objects and purposes for which the corporation is organized are:

> "To acquire by purchase or exchange, or in any other manner, in the United States or in Foreign

Countries, mining and mineral rights, concessions or grants, or any interest therein, and to sell, exchange, lease or in any other manner to dispose of the whole or any part thereof or any interest therein when desirable.

"To buy, sell, and otherwise deal in ores, metals, plants, machinery, tools, implements, groceries, provisions, clothing, boots and shoes, hardware, wooden and metallic ware, and all other articles and things in anywise required or capable of being used in connection with mining operations, and to manufacture all such articles when required."

Mutual Gold therefore had the right, by virtue of the articles themselves, to sell or exchange all its assets even before the corporation act was enacted, and without regard to any court decisions about corporations whose articles did not contain such provisions. (*Logie v. Mother Lode Copper Mining Co., supra.*)

Subheading (e), page 43 of appellants' brief. Appellants contend that no provision was made for the payment of creditors. But Garbutt arranged to get the money to pay the open-account creditors [Tr. 466, 469, 715], and Vance, the one creditor the directors feared, and the one who caused this suit to be brought and who sued the corporation in the Washington courts on accounts not due, refused to receive payment. Also, an agreement for payment of all creditors was made August 23, 1939 [Tr. 520]. The trial court's finding XXXVII [Tr. 200] is conclusive on the point, being supported by substantial evidence.

Subheading (f), page 45 of appellants' brief. No contract of any stockholder was impaired. There was no

contract that the corporation should not sell or exchange its assets for other than cash, or that it would not sell without unanimous stockholders' consent. Such contract as existed was exactly to the contrary under the above-quoted sections of the articles of incorporation. Article XII of the Constitution of Washington, section 1, reads:

> "Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended or repealed by the Legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited or restrained by law."

Appellants contend that under *Moore v. Los Lugos Gold Mines,* 172 Wash. 570, 21 Pac. (2d) 253, decided in April, 1933, before the corporation act became effective, there was an implied contract with every stockholder as to corporations existing on January 1, 1934, that not all the corporation's assets could be transferred without his consent if the corporation was solvent, or for other than cash if not solvent. If the argument were sound, there could be no cumulative voting and no voluntary dissolving of such corporations in Washington.

Anyway, that case dealt with an attempt to change non-assessable shares to assessable shares. Of course the provision in the certificates that the shares were non-assessable was a part of the shareholder's contract, and of course it could not be changed without his consent. But at that, the court in its decision, when referring to the *Logie* case, said:

> "In the light most favorable to the respondents, the case holds no more than that where a corporation is unable to obtain funds with which to operate, the

board of trustees, with the approval of a large majority of the stockholders, may sell the entire property and business of the corporation even against the protest of the minority."

Section 3803-36, quoted on page 32 of appellants' brief, was intended to meet exactly the Mutual Gold situation and was strictly complied with [Finding X, Tr. 184, XI, XII, XIII, XIV, XV, XVII, XVIII and XXIX].

Subheading (g), page 46 of appellants' brief. Mutual Gold exists as it did, and has the same powers that it had, before the acts complained of by appellants were performed. It has merely exchanged one kind of property for another. That doesn't make a shell of either corporation involved in the exchange. Mutual Gold doesn't have the power now to operate the mine, it is true, but that doesn't make a shell of it.

Subheading (h), page 49 of appellants' brief. The sections of Mutual Gold's articles quoted above do not authorize giving away corporation property or disposing of it in violation of law; but this property, as the trial court held, was exchanged for an adequate consideration in accordance with the law [Tr. 203, 204]; and as above set forth, the evidence amply supports that holding.

The amount of stock issued by Log Cabin is not important. Of course $10,000.00 was not enough money to finance the enterprise, nor would the $70,000.00 that Vance once proposed to raise have been enough. But the money that was needed was furnished. Keeping the amount of stock low did keep organization expense down at a time when every dollar counted. If the mine is eventually successful, the shares will be worth much more than

par. In any event, the stock was divided between Garbutt and Mutual Gold exactly as agreed. And when appellants say that the assets of Log Cabin are merely those formerly belonging to Mutual Gold, they ignore all the new machinery and equipment bought by Log Cabin.

Appellants' Second Theory—That Proper Notice Was Not Given the Stockholders (p. 50 of Their Brief).

The notices given and the resolutions passed by the directors and the stockholders in connection therewith, are set out in Findings X [Tr. 184], XI, XII, XIII, XIV, XVIII (September 7, 1938, should be September 19, 1938, in this finding), XXVII and XXIX. At the time the resolution of August 6, 1938, was adopted, Mutual Gold was not able to meet its obligations then matured [Finding XV, Tr. 190], the amount of which is set out in Finding XXXV [Tr. 199].

It is immaterial that no mention was made in the notice of the stockholders' meeting of February 1, 1939, that the matter of ratification of the December contract would be considered. That was a regular annual meeting, and any ordinary corporation matter could be brought up for action. Section 3 of the by-laws [Tr. 218] requires that the notice of special meetings shall state the objects thereof and provides that no other business shall be transacted at such special meetings. But there is no such provision as to annual meetings, and section 7 of the by-laws [Tr. 220] contemplates that new business shall be taken care of at annual meetings and does not place any restrictions on such business.

The notice sent out for that meeting stated that it was to be "for the purpose of electing a board of directors for said corporation for the ensuing year, for hearing the reports of officers of said corporation and for the transacting of any other business that may properly come before said meeting" [Tr. 438].

It should be noted too that the meeting of the stockholders on August 6, 1938, was a regular annual meeting.

Appellants' Third Theory—That There Was Business Compulsion by Garbutt (p. 53 of Their Brief).

This theory is disposed of by Findings XXXIX and XL [Tr. 201, 202], which are supported by much uncontradicted evidence [Tr. 251, 275, 343, 382, 383, 385, 406, 407, 408, 409, 411, 414, 415, 416, 417 to 422, 453, 454, 458, 460, 461, 528, 530, 536, 563, 605, 709, 710, 714, 745, 755 and 785].

Appellants' Fourth Theory—That Garbutt Violated His Trust (p. 66 of Their Brief).

The evidence shows that everything that was done by Garbutt and those he dealt with was contemplated from the beginning of negotiations between him and Mutual Gold. His first proposal contemplated that he should receive everything he did receive. Any trust relationship arising was incidental to, and was a part of the procedure of, carrying out the original plan, which was not departed from in any material respect. In other words, before the trusteeship arose, both Garbutt and Mutual Gold intended to do everything that was done after it arose, except that Garbutt advanced more money than he expected to advance. He did not fail in any particular to do what he

agreed to do. No violation of a trust can arise out of transactions which a competent beneficiary enters into and wants the trustee to enter into.

The evidence shows that so far Garbutt has not profited at all anyway, but on the contrary is out considerable work, and has not recovered any of his advances. It shows also that whether he will ever get his advances back, much less a profit, is an uncertainty, which he is willing to pass on to plaintiffs for half said advances in cash and the rest over a reasonable time [Tr. 549]. Appellants appear to assume that he has acquired a very valuable mining property, but the value of a mining property is finally to be determined by the amount of ore that can be mined and milled profitably. Actual efficient operation has so far shown no substantial profit.

Further, Garbutt does not have the mining claims. They are still owned by Mrs. Ryan and Chandis Securities Company. All he has is half the stock, plus one share, of a corporation that has a contract to buy the property. If he pays for the property out of earnings or out of his own private funds loaned to Log Cabin, he will have then, as a Log Cabin stockholder, only an approximate half interest in this property which he will then have paid for; and Mutual Gold, as such stockholder, will have an approximate half interest in this property which it will not have paid for and could not have paid for. Mutual Gold has been furnished with working capital and the services of a capable executive; and for that it was and is willing to let Garbutt have a half interest in some equipment of little value that it had, in some unimproved unpatented claims of no proved value, and in the Ryan-Chandis Securities Company claims if and when he can pay for them.

Appellants' Fifth Theory—That the Transactions Are Void Because There Were Directors Who Served on Both the Mutual Gold and the Log Cabin Board (p. 68 of Their Brief).

Those of Mutual Gold's directors who have served on the Log Cabin board [Tr. 350] were placed there at the request of Mutual Gold in order that they might look out for Mutual Gold's interests [Tr. 463]. The fact that Mutual Gold's directors were for a while in the majority on the Log Cabin board, and the fact that Mutual Gold has had full minority representation on that board at all times when it wanted it, is testimony to the good faith and fair dealings of Garbutt, who holds a majority of the Log Cabin stock. The rule against directors serving on two boards does not go so far as to prevent representation intended to safeguard the interests of Mutual Gold.

Appellees submit that the judgment should be sustained.

Respectfully,

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